 GC 92-223

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 13, 1993 Decided November 23, 1993

No. 93-1092

ACTION FOR CHILDREN'S TELEVISION;
AMERICAN CIVIL LIBERTIES UNION;
THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.;
CAPITAL CITIES/ABC, INC.;
CBS INC.;
FOX TELEVISION STATIONS, INC.;
GREATER MEDIA, INC.;
INFINITY BROADCASTING CORPORATION;
MOTION PICTURE ASSOCIATION OF AMERICA, INC.;
NATIONAL ASSOCIATION OF BROADCASTERS;
NATIONAL PUBLIC RADIO;
PEOPLE FOR THE AMERICAN WAY;
POST-NEWSWEEK STATIONS, INC.;
PUBLIC BROADCASTING SERVICE;
RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION;

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS;
SOCIETY OF PROFESSIONAL JOURNALISTS,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

MORALITY IN MEDIA;
NATIONAL FAMILY LEGAL FOUNDATION;
AMERICAN FAMILY ASSOCIATION;
FOCUS ON THE FAMILY;
NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES;
CONCERNED WOMEN OF AMERICA;
NATIONAL COALITION AGAINST PORNOGRAPHY;
NATIONAL ASSOCIATION OF EVANGELICALS;
RELIGIOUS ALLIANCE AGAINST PORNOGRAPHY;
FAMILY RESEARCH COUNCIL;
NATIONAL RELIGIOUS BROADCASTERS,
AMICI CURIAE

No. 93-1100

PACIFICA FOUNDATION;
NATIONAL FEDERATION OF COMMUNITY BROADCASTERS;
AMERICAN PUBLIC RADIO;

NATIONAL ASSOCIATION OF COLLEGE BROADCASTERS;
INTERCOLLEGIATE BROADCAST SYSTEM;
PEN AMERICAN CENTER;
ALLEN GINSBERG,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

Petition for Review of an Order
of the Federal Communications Commission

Timothy B. Dyk argued the cause for petitioners Action for Children's Television, *et al.*, in No. 93–1092. With him on the joint brief were *Barbara McDowell, Marjorie Heins, James J. Popham, Molly Pauker, Steven A. Lerman, Dennis P. Corbett, Laura B. Humphries, John P. Crigler, Elliot M. Mincberg, Henry L. Baumann, Steven A. Bookshester, Theodore A. Miles, Karen Christensen, Eric M. Lieberman, Thomas C. Viles, Andrew J. Schwartzman, Jonathan D. Blake, Paula A. Jameson, Nancy H. Hendry, Joseph L. Scharff, Jane E. Kirtley, Bruce W. Sanford and Henry S. Hoberman.* *Steven R. Shapiro* entered an appearance for petitioner American Civil Liberties Union in No. 93–1092. *Martin Wald* entered an appearance for petitioner Post–Newsweek Stations, Inc., in No. 93–1092.

Eric M. Lieberman argued the cause for petitioners Pacifica Foundation, *et al.*, in No. 93–1100. With him on the brief was *John P. Crigler.* *Thomas C. Viles* entered an appearance for petitioners in No. 93–1100.

Jane E. Mago, Assistant General Counsel, Federal Communications Commission, argued the cause for respondents.

With her on the brief were *Renee Licht*, Acting General Counsel, *Daniel McMullen Armstrong*, Assistant General Counsel, *Clifford G. Pash, Jr.*, and *Peter A. Tenhula*, Counsel, Federal Communications Commission, and *Barbara L. Herwig* and *Jacob M. Lewis*, Attorneys, United States Department of Justice.

On the joint brief for *amici curiae* were *George R. Grange, James P. Mueller* and *Paul J. McGeady*.

Before MIKVA, *Chief Judge*, WALD and EDWARDS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WALD.

Opinion concurring specially filed by *Circuit Judge* EDWARDS.

WALD, *Circuit Judge:* Petitioners, a group of broadcasters, authors, program suppliers, listeners, and viewers challenge the constitutionality of a Federal Communications Commission ("FCC" or "Commission") order, issued at the direction of Congress, banning "indecent" material from broadcasting during the hours from 6 a.m. to midnight.[1] While we break some new ground, our decision that the ban violates the First Amendment relies principally upon two prior decisions of this court in which we addressed similar challenges to FCC orders restricting the broadcasting of "indecent" material, as defined by the FCC. *See Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT I*"), *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281 (1992) ("*ACT II*").

The FCC invokes three goals to justify the regulations: (i) "ensuring that parents have an opportunity to supervise their children's listening and viewing of over-the-air broadcasts,"

[1] Petitioners challenge the constitutionality of section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (1992), and the FCC's implementing order, *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 8 F.C.C.R. 704 (1993).

(ii) "ensuring the well being of minors" regardless of parental supervision, and (iii) protecting "the right of all members of the public to be free of indecent material in the privacy of their homes." *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 8 F.C.C.R. 704, 705–706 ¶¶ 10, 14 (1993) ("*1993 Order*"). *See* Respondents' Brief at 14. For reasons stated below, we find the third interest, protecting the general public, insufficient to support a restriction on the broadcasting of constitutionally protected "indecent" material; we accept as compelling the first two interests involving the welfare of children, but in our view, the FCC and Congress have failed to tailor their efforts to advance these interests in a sufficiently narrow way to meet constitutional standards.

I. Background

Since the Radio Act of 1927, federal law has prohibited the broadcasting of "indecent" material. 18 U.S.C. § 1464.[2] *See* Radio Act of 1927, Pub. L. No. 69–632, § 29, 44 Stat. 1162, 1172–73; *FCC v. Pacifica Found.*, 438 U.S. 726, 735–38 (1978) ("*Pacifica*") (discussing statutory history of indecency regulation).[3] The Commission interpreted the "concept of 'indecent' [to be] intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." *Pacifica Found.*, 56 F.C.C.2d 94, 98 (1975), *quoted in Pacifica*, 438 U.S. at 731–32.

[2] Section 1464 provides:

> Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

18 U.S.C. § 1464.

[3] *ACT II* details the early history of this trilogy of "indecency" cases. We will report only as much as necessary to inform this opinion, adding recent and relevant developments. *See ACT II*, 932 F.2d at 1506–07.

In 1978, the Supreme Court upheld an FCC decision finding "indecent" a monologue by entertainer George Carlin entitled "Filthy Words" broadcast over radio at 2 o'clock in the afternoon. *Pacifica*, 438 U.S. at 734–35, 750–51. For the next decade the Commission limited itself to enforcing the § 1464 indecency ban only against material involving "the repeated use, for shock value, of words similar or identical to those satirized in the Carlin 'Filthy Words' monologue." *In re Infinity Broadcasting Corp. of Pa.*, 3 F.C.C.R. 930 ¶ 4 (1987) ("Reconsideration Order"). In addition, the Commission took no action against broadcasters who broadcast indecent but not obscene material after 10 p.m. *Id.*

In 1987 the Commission broadened its enforcement of § 1464 by issuing a ruling which affirmed, on reconsideration, three prior rulings against broadcasters for airing indecent material. *Reconsideration Order*, 3 F.C.C.R. 930.[4] First, the Commission narrowed the safe harbor period for "indecent" material to the hours between midnight and 6 a.m.; second, it broadened its enforcement of § 1464 to include all material encompassed by its description of "indecency" rather than only the "Filthy Words" category. The Commission also abandoned reliance on the time of broadcast as an element of the determination of whether material was "indecent." It now considered broadcast time only as a factor in the decision of whether to take action against "indecent" broadcasting. *See ACT I*, 852 F.2d at 1338 n.8. Today, the FCC "defines broadcast indecency as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *1993 Order*, 8 F.C.C.R. at 704–5 ¶ 4 n.10. This does not appear materially different from the definition considered in *ACT I*.

[4] The order upheld, on reconsideration, the FCC's prior rulings in *In re Infinity Broadcasting Corp. of Pa.*, 2 F.C.C.R. 2705 (1987); *In re Pacifica Found.*, 2 F.C.C.R. 2698 (1987); *In re Regents of the Univ. of Cal.*, 2 F.C.C.R. 2703 (1987).

The Reconsideration Order was the subject matter of *ACT I*, which upheld the indecency standard promulgated by the FCC against vagueness and overbreadth challenges in light of the Commission's "avowed objective ... not to establish itself as a censor but to *assist parents* in controlling the material young children will hear." 852 F.2d at 1334 (emphasis in original). *See also id.* at 1343. However, *ACT I* struck down the contraction of the safe harbor period to midnight through 6 a.m. as unjustified by the record. *Id.* at 1334. In particular, the *ACT I* court noted that the Commission had not explained its expansion of the definition of protected "children" from below–12 years of age to adolescents from 12–17, and moreover, had merely estimated "the number of teens in the *total* ... audience," and not adduced any specific audience data for the "specific ... stations" that were alleged to have placed children at risk of exposure to indecent material. *Id.* at 1341 (emphasis in original). *See id.* at 1341–44.

Following *ACT I*, Congress passed an appropriations rider which directed the FCC to promulgate regulations for the enforcement of § 1464 on a 24–hour per day basis. Pub. L. No. 100–459, § 608, 102 Stat. 2186, 2228 (1988). The FCC conducted rulemaking proceedings in support of the 24 hour ban in 1989–90. *See In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 4 F.C.C.R. 8358 (1989) (notice of inquiry) ("1989 NOI"); 5 F.C.C.R. 5297 (1990) ("1990 Report"). This court in *ACT II* struck down the 24–hour prohibition on broadcasting of indecent material. 932 F.2d at 1510. The court relied largely on its interpretation of *ACT I* as requiring that *some* safe harbor for broadcasting indecent material be maintained, and that even "Congress itself" could not totally ban indecent speech. *Id.* at 1509. Since the decision in *ACT II* "effectively return[ed] the Commission to the position it briefly occupied after *ACT I* and prior to congressional adoption of" the 24–hour ban, we directed the Commission to resume its rulemaking to determine the factual issues as mandated by *ACT I:* "among them, the appropriate definitions of 'children' and 'reasonable risk' [of exposure to indecent material] for channeling purposes, the paucity of station- or program-specific audience

data expressed as a percentage of the relevant age group population, and the scope of the government's interest in regulating indecent broadcasts." *ACT II*, 932 F.2d at 1510 (citing *ACT I*, 852 F.2d at 1341–44).

Before the Commission could initiate hearings after *ACT II*, Congress intervened once again, passing the Public Telecommunications Act of 1992, Pub. L. No. 102–356, 106 Stat. 949 (1992) ("Telecommunications Act"), which in section 16(a) required the Commission to promulgate a new rule barring indecent material during the broadcast hours from 6 a.m. to midnight, but allowing public broadcast stations that go off the air at or before midnight an additional two hours (between 10 p.m. and midnight) during which they may broadcast "indecent" material. *Id.* at § 16(a), 106 Stat. at 954. Since "Congress ha[d] balanced the competing interests affected by the regulation of broadcast indecency and ha[d] determined that a 12 midnight-to-6 a.m. safe harbor properly effectuates those interests[, t]he focus of th[e ensuing rulemaking] proceeding [was] ... confined to the matter of updating the Commission's record pertaining to the governmental interest in restricting the broadcasting of indecent material." *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 7 F.C.C.R. 6464, 6465 ¶ 9 (1992) (notice of proposed rulemaking) ("1992 NPRM") (footnote omitted).

The Commission subsequently released a Report and Order which articulated the government's interests as (i) "ensuring that parents have an opportunity to supervise their children's listening and viewing of over-the-air broadcasts," (ii) "ensuring the well being of minors" regardless of parental supervision, and (iii) protecting "the right of all members of the public to be free of indecent material in the privacy of their homes." *1993 Order*, 8 F.C.C.R. at 705–06 ¶¶ 10, 14. The resulting regulations track section 16 of the Telecommunications Act, prohibiting public radio and television stations that go off the air on or before midnight from airing indecent material between 6 a.m. and 10 p.m., and prohibiting all other

broadcast stations from airing indecent material between the hours of 6 a.m. and midnight. *Id.* at 711 (Appendix A) (to be codified at 47 C.F.R. § 73.3999).

Petitioners seek review of these regulations, charging primarily that they are unconstitutional first, because they are not narrowly enough tailored to meet First Amendment standards, and second, because the exception they make for public broadcast stations that go off the air on or before midnight violates the equal protection of the laws. The Commission's 1993 Order has been stayed pending review. *Action for Children's Television v. FCC,* No. 93–1092 (D.C. Cir. Jul. 23, 1993) (order filed). Because we conclude that the basic 6 a.m.-to-midnight ban, despite compelling interests regarding the protection of children, is not sufficiently narrow to meet constitutional requirements, we do not reach petitioners' equal protection challenge to the additional 10 p.m.-to-midnight safe harbor granted only to public broadcast stations going off the air before midnight.[5]

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[5] Petitioners contend that this case is "controlled by *ACT I* and *ACT II,* which recognize that a 6 a.m.-to-midnight indecency prohibition is unconstitutional." Joint Brief of Petitioners at 17. There is one significant difference between those cases and this one, however. In *ACT I* we determined that in adopting a 6 a.m.-to-midnight ban on broadcasting indecent material, the FCC *as an agency* had not adequately justified its *change* in policy. *See, e.g.,* 852 F.2d at 1342 ("apparent change in policy warrants explanation"). Congress is under no such obligation to justify its *change* in policy, and is free to alter its delegation to an agency. *See, e.g., INS v. Chadha,* 462 U.S. 919, 955 (1983) (Congress is free "legislatively [to] alter[ ] or revoke[ ]" its "delegation of authority" (footnote omitted)). Of course, where the First Amendment is involved, we do not defer entirely to legislative findings, *see, e.g., Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115, 129 (1989), but when examining the constitutionality of a regulation the terms of which are spelled out by Congress and leave no room for agency discretion, we are, in effect, reviewing the underlying statute for conformity with the Constitution rather than reviewing a regulation for conformity with the Administrative Procedure Act, 5 U.S.C. §§ 551–706. *Cf. ACT II,* 932 F.2d 1504.

To clear the channels for our subsequent discussion, we reiterate accepted doctrine that (i) indecent speech is protected by the First Amendment, *see ACT II,* 932 F.2d at 1509; *ACT I,* 852 F.2d at 1340, and (ii) the government may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest," *Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115, 126 (1989). *See Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 530, 540 (1980); *ACT II,* 932 F.2d at 1509; *ACT I,* 852 F.2d at 1343 n.18.

II. Protection of Adults

Relying mainly on *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978), the government maintains that the 6 a.m.-to-midnight ban promotes its compelling interest in protecting the privacy of every American's home. *See* Respondents' Brief at 23, *1993 Order,* 8 F.C.C.R. at 706 ¶ 14. It argues that *Pacifica* acknowledges the " 'uniquely pervasive presence' " of broadcasting which invades residential privacy where " 'the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.' " Respondents' Brief at 23 (quoting *Pacifica,* 438 U.S. at 748). This inherently intrusive nature of broadcasting, the government contends, permits it to ban indecent material from the airwaves during all but the hours when most people are asleep.

The Supreme Court in *Pacifica* held that the FCC had the authority to sanction a licensee who broadcast the indecent Carlin monologue at 2 o'clock in the afternoon. 438 U.S. at 735, 750–51. *Pacifica* was a quite narrow decision upholding only the ruling of the FCC sanctioning specific words in a specific context broadcast at a specific time of day. *Id.* at 750 ("It is appropriate . . . to emphasize the narrowness of our holding."); *id.* at 755–56 (Powell, J., concurring).[6] The Court

[6] While *ACT I* acknowledges that *Pacifica* "identified" an interest in "protecting the adult listener from intrusion, in the form of

expressly cautioned that it was not endorsing the reasoning of the underlying FCC ruling,[7] but only its ultimate holding that the Carlin monologue on "Filthy Words" as broadcast at 2 p.m. violated the indecency ban of § 1464. *Id.* at 734–35. Indeed, the Supreme Court's decision might well be read as limited to situations in which children must be protected from exposure to indecent material. Although an adult had been listening to the program with his son, *id.* at 730, the Court went out of its way to emphasize the limits of its ruling by cautioning that "whether broadcast audiences in the late evening contain so few children that playing this monologue would be permissible is an issue neither the Commission nor this Court has decided." *Id.* at 750 n.28. Therefore, despite recognition of the "relevance" of the privacy interest, *id.* at 748, *Pacifica* did not rest its holding on a general privacy rationale applicable to adults and children alike. *See id.* at 750 ("The ease with which children may obtain access to broadcast material, coupled with the concerns [relating to children] recognized in *Ginsberg[v. New York*, 390 U.S. 629 (1968)], amply justify special treatment of indecent broadcasting."); *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) ("In ... *Pacifica* ... this Court did recognize that the Government's interest in protecting the young justified special treatment of an afternoon broadcast heard by adults as well as children." (footnote omitted)); *New York v. Ferber*, 458 U.S. 747, 757 (1982) ("[W]e held [in *Pacifica*] that the Government's interest in the 'well-being of its youth' justified special treatment of indecent broadcasting received by adults as well as children." (citation omitted)).[8]

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offensive broadcast materials, into the privacy of the home," it does not endorse its legitimacy. *ACT I*, 852 F.2d at 1344 n.20.

[7] The underlying FCC ruling had advanced the protection of unconsenting adult listeners as one purpose of the restriction on indecent material. *See Pacifica*, 438 U.S. at 731 n.2.

[8] Similarly, the government relies too broadly on the Supreme Court's decision in *Sable* for the proposition that the unique characteristics of the broadcast medium warrant restrictions protecting the privacy of the home that might be impermissible in other

We too are reluctant to recognize any generalized government interest in protecting adults from indecent speech, primarily because the official suppression of constitutionally protected speech runs counter to the fundamental principle of the First Amendment "that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). *Accord Hustler Magazine v. Falwell*, 485 U.S. 46, 55–56 (1988). While we recognize that in broadcasting the First Amendment primarily protects "the right of the viewers and listeners, not the right of the broadcasters," *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (citation omitted), we note that by the same token, the First Amendment protects the rights of *all* listeners and viewers—not just of that part of the audience whose listening and viewing habits meet with government approval. Therefore, " '[a]t least where obscenity is not involved, [the Supreme Court] ha[s] consistently held that the fact that protected speech may be offensive to some does not justify its suppression.' " *Bolger*, 463 U.S. at 71 (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977)).

Bolger, in striking down a complete ban on unsolicited mailings of contraceptive advertisements, noted that in order to permit the suppression of speech solely on the ground that it is offensive to some, the government must show that the audience is "captive" and cannot avoid the objectionable

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contexts. *Sable* struck down a complete ban on indecent telephone messages, and *distinguished Pacifica* as an "emphatically narrow holding" that relied not only on "the 'unique' attributes of broadcasting," *i.e.* its " 'uniquely pervasive,' [nature that] can intrude on the privacy of the home without prior warning as to program content," but also on the fact that it is " 'uniquely accessible to children, even those too young to read.' " *Sable*, 492 U.S. at 127 (quoting *Pacifica*, 438 U.S. at 748–49). *Accord Bolger*, 463 U.S. at 74 (similarly distinguishing mailings from broadcast reception). *Sable* noted that a person who places a telephone call exercises more control over the message received than does the listener who flips on the radio. 492 U.S. at 128. More important, however, *Sable* ultimately refused to adopt any general privacy rationale in the telephone context. *Id.*

speech. *Id.* at 72. *See also Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 538–42 (1980) (striking down subject-matter restriction on public utility's bill inserts where utility bill readers were not captive audience); *Frisby v. Schultz*, 487 U.S. 474, 484–87 (1988) (upholding restriction on residential picketing because target of the focused picketing is a captive audience); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (upholding selective grant of advertisement space in rapid transit cars where audience is captive). We refrain, however, from extending the captive audience rationale to the context of scheduled broadcast programming. *Cf. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 127–28 (1973) (noting that broadcast audience is captive with respect to advertisements that interrupt scheduled programs).[9] Viewers and listeners of scheduled programs do retain options that the resident who is involuntarily picketed, or the commuter who must use public transportation in order to earn her livelihood does not. Viewers and listeners retain the option of using program guides to select with care the programs they wish to view or hear. Occasional exposure to offensive material in scheduled programming is of roughly the same order that confronts the reader browsing in a bookstore. And as a last resort, unlike residential picketing or public transportation advertising "the radio [and television] can be

[9] Recognition of the "captive" nature of the broadcast audience with respect to advertisements does not grant the government *carte blanche* for the suppression of ideas. For example, *Columbia Broadcasting* quotes *Banzhaf v. FCC*, 405 F.2d 1082, 1100–01 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969), as a case recognizing the captive nature of the broadcast audience with respect to commercials. *Columbia Broadcasting*, 412 U.S. at 128. In *Banzhaf*, however, this court upheld an FCC ruling that required broadcasters who air cigarette commercials to *grant reply time* to anti-smoking groups, noting specifically that "not only does the cigarette ruling not repress any information, it serves affirmatively to provide information." *Banzhaf*, 405 F.2d at 1103. *Banzhaf* involved no suppression of television commercials due to the captive nature of the audience, but to the contrary only required that supplementary informative material be broadcast.

turned off." *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932) (unanimous). *See Lehman*, 418 U.S. 302 (plurality) (quoting same).

Even if we were to accord some measure of legitimacy to the government's interest in protecting the privacy of the home from unwelcome broadcast material, the government has undermined its own reliance on that interest, by arguing that " 'submission of market-wide data demonstrating that there is no appreciable child audience during the relevant time period would raise a viable defense to a charge of indecency outside of the safe harbor [time period].' " Respondents' Brief at 39 (quoting *1993 Order*, 8 F.C.C.R. at 710 ¶ 37, and citing *1990 Report*, 5 F.C.C.R. at 5309 ¶¶ 89–90). Validation of this potential defense to a charge of indecent broadcasting reveals the government's true concern as the protection of children—not adults—from indecent broadcasting. Since the asserted interest in protecting adults falls completely out of the picture with the disappearance of children in the audience, we must assume that the purpose of the ban is to protect only the children.[10] We consequently

[10] The Commission similarly undermines its own reliance on *Pacifica*'s dictum that " '[t]o say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.' " Respondent's Brief at 24 (quoting *Pacifica*, 438 U.S. at 748–49). The Commission tells us it would, for example, permit airing a reading of *Ulysses* not because it is entirely free of objectionable language, but because " 'we would not expect that the Commission would find such [objectionable] references, dispersed as they would have been throughout the three-hour reading of this work of literature, to be patently offensive.' " Respondent's Brief at 28 (quoting *Thomas Byrne*, at n.1 (MM Bur., April 7, 1988)).

This reasoning seems, at the least, inconsistent. A single objectionable reference under the Commission's ruling apparently would not trigger a sanction. Therefore, viewers and listeners cannot expect to be shielded from all offensive material even when enjoying FCC-approved programs. On the other hand, in the absence of any regulation of indecent material on broadcast programs, an adult retains the option of turning to another channel after the first

reject reliance on a generalized privacy rationale to justify regulation of indecent broadcasting.

III. Protection of Children

The Commission invokes two separate interests relating to children purportedly served by the 6 a.m.-to-midnight ban: (i) an interest in helping parents supervise their children, and (ii) an independent interest in shielding children from exposure to indecent material regardless of parental supervision. Recognizing that "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults,'" *Ginsberg*, 390 U.S. at 638 (footnote omitted) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)), we acknowledge the compelling nature of both government interests in protecting children. Nevertheless, despite those compelling interests we find that the 6 a.m.-to-midnight ban is not narrowly tailored to meet constitutional standards. We address each issue in turn.

A. *The Government's Interests in the Protection of Children*

The government's interest in helping parents supervise their children has been repeatedly recognized as sufficiently important to justify restrictions on First Amendment activities. *See, e.g., Ginsberg*, 390 U.S. at 639 (upholding regulation of material that was obscene for minors, but not adults). But where constitutionally protected speech is restricted, the government must demonstrate that the restriction is narrowly tailored to advance the asserted compelling interest. *Sable*, 492 U.S. at 126–31; *ACT II*, 932 F.2d at 1509; *ACT I*, 852 F.2d at 1343–44. In *ACT I* this court held that the government could "[c]hannel[ ]" programming in order to "protect unsupervised children" but only so long as it remained "sensi-

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objectionable remark is made, thereby avoiding further intrusion. In so doing, an individual would not have suffered more intrusion than had she listened to a government-approved reading of *Ulysses*. *Cf. Bolger*, 463 U.S. at 72 (noting that generally, recipients of objectionable mailings can simply avert their eyes to avoid further bombardment, and that government can shield only a captive audience that cannot avoid objectionable speech).

tive to the first amendment interests of broadcasters, adults, and parents." 852 F.2d at 1340 & n.12.

The government's asserted interest in protecting children also includes its independent interest in protecting the well-being of vulnerable youth and in shielding them from physical and psychological abuse. The Supreme Court has recognized this interest as compelling. *Ferber*, 458 U.S. at 756–57 ("It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling." (internal quotations and citation omitted)); *Ginsberg*, 390 U.S. at 640; *Prince*, 321 U.S. at 165. Accordingly, the Supreme Court has repeatedly upheld restrictions on First Amendment liberties if sufficiently justified by the need to protect the well-being of minors. *See Ferber*, 458 U.S. at 757. In *Pacifica*, the Supreme Court specifically held that the government "may ... prohibit[ ] ... making indecent material available to children," based, in part, upon the government's independent interest in the " 'well-being of its youth.' " *Pacifica*, 438 U.S. at 749 (quoting *Ginsberg*, 390 U.S. at 640). The government, therefore, has a compelling interest in restricting the exposure of children to indecent material in the broadcast media.

B. *Least Restrictive Means*

The government has, however, failed to demonstrate that its 6 a.m.-to-midnight ban on indecent material is the least restrictive means to advance its interests in the protection of children. *See Sable*, 492 U.S. at 126. Upon a thorough examination of the legislative and administrative record,[11] *see id.* at 129 (" 'Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.' " (quoting *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978)), we conclude that the government did not properly weigh viewers' and listeners' First Amendment rights when balancing the competing interests in determining the widest safe harbor period consistent with the protection

[11] Congress incorporated the FCC's 1990 Report into the legislative record. *See* 138 CONG. REC. S7310 (daily ed. June 2, 1992) (submission by Sen. Helms).

of children.[12] More broadly, we are at a loss to detect any reasoned analysis supporting the particular safe harbor mandated by Congress.

1. *Parental Supervision*

To begin with, the particular safe harbor chosen by Congress and the FCC is not satisfactorily explained as an attempt to prohibit the broadcasting of indecent material at times when parental supervision is apt to be least effective. Indeed, one could intuitively assume that as the evening hours wear on, parents would be better situated to keep track of their children's viewing and listening habits. The FCC, on the other hand, argues broadly that " 'parents can effectively supervise their children only by co-viewing or co-listening, or, at a minimum, by remaining actively aware of what their children are watching and listening at all times.' " Respondents' Brief at 30–31 (quoting *1993 Order*, 8 F.C.C.R. at 710 ¶ 36). Because "it is not practical for parents to exercise this type of control," *1990 Report*, 5 F.C.C.R. at 5305 ¶ 62, the FCC's argument continues, "parents who seek to avoid exposing their children to indecency face a nearly impossible task if such material is broadcast." Respondents' Brief at 26. The Commission's argument appears to assume that, regardless of the time of day or night, parents cannot effectively supervise their children's television or radio habits. Accordingly, the government has not adduced any evidence suggesting that the effectiveness of parental supervision varies by time of day or night, or that the particular safe harbor from midnight to 6 a.m. was crafted to assist parents at specific times when they especially require the government's help to supervise their children. The inevitable logic of the government's line of argument is that indecent material can never be broadcast, or, at most, can be broadcast during times when children are surely asleep; it could as well support a limited 3:00 a.m.–to–3:30 a.m. safe harbor as one from midnight to 6 a.m.

2. *Shielding Minors from Indecent Material*

Alternatively, the government has justified its safe harbor as an effort to shield all minors regardless of age from

[12] As conceded at oral argument, petitioners do not challenge the FCC's authority to regulate "indecent" material in the broadcast

exposure to indecent material. The government undoubtedly has a compelling interest in preventing exposure to indecent material of children "both old enough to understand and young enough to be adversely affected" by the indecent material. *Pacifica*, 438 U.S. at 750 n.29. Yet, while the interest in preventing children's exposure to indecent material is compelling, the grounds for restricting a minor's First Amendment rights (here as listener or viewer) fade as the minor matures.

The Supreme Court has long recognized that the Constitution does not exist for adults alone. *See In re Gault*, 387 U.S. 1, 13 (1967). "In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 (1975) (footnote and citations omitted). *See Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) [13]; *Carey v. Population Servs. Int'l*, 431 U.S. 678, 692 n.14 (1977) (plurality) ("minors are entitled to constitutional protection for freedom of speech" (citing *Tinker*, 393 U.S. 503)). In *Erznoznik*, the Supreme Court rejected the government's general interest in protecting minors from films containing nudity. It held that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." 422 U.S. at 213–14. Contrary to the government's contention, *Pacifica* did not overrule *Erznoznik*. *Pacifica* was an emphatically nar-

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media by creating a safe harbor outside of which indecent material may not be broadcast.

[13] To limit *Tinker*'s recognition of minors' First Amendment rights to the school context would stand the decision on its head. The Court in *Tinker* held that students do not "*shed* their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506 (emphasis added). Of course this assumes that minors *have* First Amendment rights outside the school context. Indeed the Court noted as much saying that "[s]tudents in school as well as out of school are 'persons' under our Constitution[, and] . . . are possessed of fundamental rights which the State must respect." *Id.* at 511.

row decision upholding an FCC ruling on the basis that it was properly aimed at preventing children's exposure to indecent material at a time when the FCC defined children as minors under the age of 12.[14] The Court was particularly concerned that "broadcasting is uniquely accessible to children, *even those too young to read*," *Pacifica*, 438 U.S. at 749 (emphasis added), and strongly implied that the Commission would *not regulate* material that "would not be likely to command the attention of many children who are both old enough to understand and young enough to be adversely affected" by its content. *Id.* at 750 n.29. Therefore, while *Pacifica* may have implicitly limited *Erznoznik* where very young children are involved, we do not read *Pacifica* as a wholesale dismissal of older minors' First Amendment rights that had been explicitly recognized by the Court in *Erznoznik*.[15]

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[14] The FCC contends that *Pacifica* endorses the government's power to restrict the broadcast of indecent speech to minors regardless of age, and that the government therefore need not consider the First Amendment rights of minors in the context of regulating indecent material in the broadcast media. *See* Respondents' Brief at 37–38. *Pacifica* does not reach that broadly. In *Pacifica*, the Commission's regulation of indecent broadcasting was part of an effort to protect children *under the age of 12* from "indecent" material. *See ACT I*, 852 F.2d at 1340–42 (noting that FCC's brief to the Supreme Court in *Pacifica* argued that the regulation attempted to minimize the risk of exposing children under the age of 12 to indecent material). In *ACT I* we specifically directed the FCC to explain "why it takes teens aged 12–17 to be the relevant age group for channeling purposes." 852 F.2d at 1341. The First Amendment rights of teenagers, therefore, were at issue neither in *ACT I* nor in *Pacifica*. In addition, while in *Sable*, the Supreme Court said the protection of children includes "preventing minors from being exposed to indecent" material, it ultimately struck down the ban on indecent telephone messages because it was not narrowly tailored to served that interest. *Sable*, 492 U.S. at 131.

[15] Indeed, the *Pacifica* Court apparently distinguished *Erznoznik* on the ground that it involved speech outside the home, where the interests of the offensive *speaker* sometimes outweigh those of the unwilling listener. *Pacifica*, 438 U.S. at 749 n.27. This difference,

Nevertheless, as suggested by the Court in *Ginsberg* (upon which *Pacifica* specifically relied),[16] children are afforded special treatment under the First Amendment in part because of their " 'immaturity.' " *Ginsberg*, 390 U.S. at 638 n.6 (quoting Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 939 (1963)).[17] In short, children may be unable to avoid speech that adults know to be harmful to them. Therefore, "[a] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Erznoznik*, 422 U.S. at 214 n.11 (quoting *Ginsberg*, 390 U.S. at 649–50 (Stewart, J., concurring)). "In assessing whether a minor has the requisite capacity for individual choice the age of the minor is a significant factor." *Id.* (citation omitted).[18] While a child's ability to make decisions is presumed to be inferior to an adult's, the capacity for choice does not remain

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of course, does not address the listener's or viewer's First Amendment rights.

[16] *See Pacifica*, 438 U.S. at 750 ("The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.").

[17] The Court in *Ginsberg* upheld a criminal obscenity statute prohibiting the sale "to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults." 390 U.S. at 631. The Court noted that obscenity is not protected by the First Amendment and that the legislation before it "simply adjusts the definition of obscenity [to] ... minors." *Id.* at 638 (citation omitted). The Court had "no occasion in th[at] case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State." *Id.* at 636 (citing *In re Gault*, 387 U.S. at 13). Also, appellant in that case did not challenge the legislation's target age of 17. *See id.* at 649 n.5 (Stewart, J., concurring).

[18] *Cf. Ginsberg*, 390 U.S. at 649 n.5 (Stewart, J., concurring) ("The appellant does not challenge New York's power to draw the line at age 17, and I intimate no view upon that question.").

dormant throughout childhood until appearing *ex nihilo* upon the arrival of a person's 18th birthday. We find, for example, nowhere "in the Constitution ... the authority to distinguish between a willing 'adult' one month past the ... [legal] age of majority and a willing 'juvenile' one month younger." *Miller v. California*, 413 U.S. 15, 27 (1973). Accordingly, we conclude that the confident abrogation of a minor's First Amendment rights by a protective government must proceed by a less rigid line than the legal age of majority.

When the government affirmatively acts to suppress constitutionally protected material in order to protect teenagers as well as younger children, it must remain sensitive to the expanding First Amendment interests of maturing minors. At some point, the government's independent interest in shielding children from offensive material no longer outweighs the First Amendment interests of minors in receiving important information. *See Erznoznik*, 422 U.S. at 213 (striking down ban on films containing nudity as not justified by interest in protection of minors, noting, *inter alia*, that prohibition would extend to films containing depictions of "the nude body of a war victim, or scenes from a culture in which nudity is indigenous"); *see also Bolger*, 463 U.S. at 74–75 n.30 (noting that statute prohibiting the unsolicited mailing of contraceptive advertisements "quite clearly denies information to minors, who are entitled to 'a significant measure of First Amendment protection' " (quoting *Erznoznik*, 422 U.S. at 212 and citing *Tinker*, 393 U.S. 503)); *Carey*, 431 U.S. at 678 (striking down restriction of sale and distribution of contraceptives to minors because it would restrict the ability to "exercise the constitutionally protected right of decision in matters of childbearing," *id.* at 688–89, and striking down ban on advertisements for contraceptives, because they interfere with "substantial individual and societal interests in the free flow of commercial information ... related to activity with which, at least in some respects, the State could not interfere," notwithstanding that the advertisements may be "offensive and embarrassing ... and ... would legitimize sexual activity of young people," *id.* at 700–01 (internal quotes and citations omitted)). Here, the government has not demon-

strated that its independent interest in shielding children from indecent broadcasts automatically outweighs the child's own First Amendment rights up to her eighteenth birthday. One would assume that even where "patently offensive" material is involved, a seventeen year old does not generally warrant the same degree of governmental protection that may be appropriate for an eight year old.

In addition, even assuming that the government's interest in protecting older minors persistently outweighs the First Amendment interests of the minors themselves, the government's weaker interest in shielding older minors from indecent speech may not suffice to outweigh the adults' First Amendment interests that are sacrificed along the way. Therefore, where First Amendment rights of adults are involved, the government may not be heard to argue globally that "there is a reasonable risk that significant numbers of children ages 17 and under" are in the listening and viewing audience "at all times of the day and night." *1993 Report*, 8 F.C.C.R. at 707 ¶ 20.[19] The government must adduce data which permits a more finely tuned trade-off between adults' First Amendment rights and the government's interest in protecting children from indecent material as that interest varies in importance with their age.[20]

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[19] As concurring Commissioner Dennis noted in the 1987 Reconsideration Order on review in *ACT I*, certainly this "argument[ ] . . . in support of midnight as the critical hour may well be equally true if applied to an earlier [or later] hour." 3 F.C.C.R. 930, 938 (Comm'r Dennis, concurring).

[20] Indeed some of the data gathered by the FCC do show a considerable difference between viewing habits of younger and older children which, however, is then neglected in the FCC's conclusion as to the constant risk of significant numbers of children in the audience. For example, the 1989 NOI upon which Congress relied, *see* 138 CONG. REC. at S7309 (statement by Sen. Helms), and upon which the Commission draws, *see 1990 Report*, 5 F.C.C.R. at 5303 ¶ 51, *1993 Report*, 8 F.C.C.R. at 707–08 ¶¶ 21–23, discusses television viewing data of four selected markets, noting the "general[ ]" similarity in late evening (until 1:45 a.m.) viewing habits between children ages 12–17 and adults. *1989 NOI*, 4 F.C.C.R. at

3. *First Amendment Rights of Adults*

More generally, there is no evidence at all in the record that the government tailored its protection of children narrowly to avoid unnecessary infringement on First Amendment rights of adult listeners and viewers. Petitioners point out, as they did in *ACT I*, that the 6 a.m.-to-midnight ban "stretch[es] to all but the hours most listeners [and viewers—young and old alike—]are asleep," thus reducing the adult population to seeing and hearing only material that is fit for children. *ACT I*, 852 F.2d at 1335. *See id.* at 1341 (citing

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8362 ¶ 33. At the same time, however, the 1989 NOI noted that "[i]n contrast, the percentage of children (ages 2–11) who are viewing TV is lower than the percentage of teen/adult viewers, and generally drops to 5% or below by approximately 10:30 to 11:00 p.m. without regard to market or time of year." *Id.* While there is some subsequent evidence that in Chicago and New York 6–8% of young children (ages 2–11) have been recorded on certain dates as watching television after 10:30 p.m., *see* 138 CONG. REC. S7322 (daily ed. June 2, 1992) (submission by Sen. Helms) (incorporating reply by Salem Communications Corp. to 1990 rulemaking proceeding), *1993 Order*, 8 F.C.C.R. at 707 ¶ 22 (citing same), the Commission has not rejected its general conclusion that the percentage of younger children (ages 2–11) who are viewing television—at least outside of Chicago and New York—drops to 5% or below by approximately 10:30–11:00 p.m.

In addition, the government has not supported its regulation of radio broadcasting with any data concerning the listening habits of children under the age of 12. The 1989 NOI, for example, finds that children ages 12–17 have similar radio listening habits to adults and that at times children ages 12–17 listened to the radio in somewhat higher percentages than adults. *1989 NOI*, 4 F.C.C.R. at 8961 ¶ 29; *1990 Report*, 5 F.C.C.R. at 5302–03 ¶¶ 38–49; *1993 Order*, 8 F.C.C.R. at 708–09 ¶¶ 24–27. The Commission cites no data for children under the age of 12, maintaining that "there [is] little quantitative information about the radio listening habits of children under 12 years of age." *1993 Order*, 8 F.C.C.R. at 708 ¶ 25 n.57. If the 6 a.m.-to-midnight ban is meant to protect children under the age of 12, we are puzzled by the government's regulation for the benefit of a radio audience about which it has no information, and are at a loss to understand "how [the government] uses the 12–17 age group figures to reach conclusions about the younger group." *ACT I*, 852 F.2d at 1341–42.

Butler v. Michigan, 352 U.S. 380, 383 (1957)). The government brushes aside this practical objection on the ground that adults have access to indecent material from broadcast sources after midnight and, more generally, from alternative sources "such as audio and video tapes, cable television, wireless cable or subscription satellite television services." *1993 Order*, 8 F.C.C.R. at 709 ¶ 30 (citing *1990 Report*, 5 F.C.C.R. at 5308–09). *See generally id.* at 709–10, ¶¶ 28–34. However, in *ACT II, supra*, we struck down a 24-hour ban on indecent broadcasting despite the Commission's assertion that adults had ample "non-broadcast alternative[s]" for receiving indecent material. *See 1990 Report*, 5 F.C.C.R. at 5308 ¶¶ 84–88. The availability of alternative sources of information simply does not relieve the government from considering the First Amendment rights of the broadcast audience.[21]

Candidly, we can locate no evidence in the record that the government has taken the First Amendment interests of adults into account in advancing its compelling interests in the protection of children. The amendment to the Telecommunications Act was offered on the floor of the Senate and was adopted without committee consideration or floor debate, *see* 138 CONG. REC. S7308 (daily ed. June 3, 1992), drawing its facts solely from the FCC's 1990 Report, *see* 138 CONG. REC. S7310 (daily ed. June 2, 1992) (submission by Sen. Helms) (incorporating 1990 Report into legislative record). The 1990 Report, in turn, had been the result of proceedings held in support of the 24-hour ban that had been ordered by Congress. *See ACT II*, 932 F.2d 1504. Therefore, when Congress relied on the 1990 Report, it relied on a rulemaking record that had been an effort "to compile a record in support of Congress' imposition of a 24-hour ban on the broadcast of indecent material." *1989 NOI*, 4 F.C.C.R. at 8361 ¶ 29. The outcome of the FCC's 1993 rulemaking proceedings pursuant to the Telecommunications Act, moreover, was preordained because that rulemaking was limited to updating the Commis-

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[21] Indeed, the Commission purports not to rely on the existence of alternative sources "as the sole basis" for its decision. *1993 Order*, 8 F.C.C.R. at 710 ¶ 34 n.89.

sion's record in the 1990 rulemaking. *See 1992 NPRM*, 7 F.C.C.R. at 6465 ¶ 9. As the government frankly admits, the sole operating principle by which Congress determined this particular safe harbor was to find a time when "the risk of children in the broadcast audience would ... be lessened." Respondents' Brief at 7 (quoting 138 CONG. REC. S7308 (daily ed. June 2, 1992) (statement of Sen. Byrd)). *See id.* at 11 ("[A] more extensive safe harbor would undermine the goals of protecting children because there are significant numbers of children in the audience at other times ...."). This exclusive focus on the number of children in the audience indicates that the government wholly failed to balance its child-oriented compelling interests against the countervailing First Amendment rights of adult listeners and viewers.[22] What it should have been aiming at was a time when the risk of child viewing was low and yet adult viewers could exercise a meaningful choice to view the material while still awake.[23]

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[22] The government's rationale in arriving at the 6 a.m.-to-midnight ban would equally support the imposition of a 24-hour ban on "indecent" material. The 1993 Order states: "In our 1990 Report ... we examined data that showed that there is a reasonable risk that significant numbers of children ages 17 and under listen to radio and view television at all times of the day and night.... We find that our earlier conclusion remains true." *1993 Order*, 8 F.C.C.R. at 707 ¶ 20. In the 1990 Report the Commission had concluded that the 24-hour ban was warranted by the audience data and did not unconstitutionally restrict adults' viewing and listening. 5 F.C.C.R. at 5308 ¶ 86.

[23] Similarly, the decision to grant public broadcasting stations an additional two hours (between 10 p.m. and midnight) during which to broadcast indecent material appears problematic as well. Economic considerations inhibiting broadcasting stations from remaining on the air after midnight would appear to apply to commercial as well as public broadcasters. Moreover, the Commission has not explained why the availability of indecent material on some stations does not defeat its overall purpose of limiting children's exposure to indecent material. While we need not reach the constitutionality of the exception for public broadcasting stations that go off the air